

STATUS OF PENDING EN BANC CASES

Today's Date: August 13, 2012

This report is provided for case identification and background information only and does not reflect the views of the court. When a case is heard or reheard en banc, the en banc court assumes jurisdiction over the entire case, see 28 U.S.C. § 46(c), regardless of the issue or issues that may have caused any member of the Court to vote to hear the case en banc. *Summerlin v. Stewart*, 309 F.3d 1193 (9th Cir. 2002). In those cases where the parties have filed petitions for rehearing en banc and oppositions, you can access the pdfs by clicking the case title.

Stengel v. Medtronic Inc., 10-17755

Three-Judge Panel Opinion: 676 F.3d 1159 (9th Cir. 2012)

Order Taking Case En Banc: 2012 WL 3039710 (9th Cir. July 25, 2012)

Date of Order Taking Case En Banc: July 25, 2012

Status: To be calendared the week of September 17, 2012, in San Francisco, California.

Members of En Banc Court: Not yet available.

Subject Matter: Appeal from the district court's dismissal, as preempted by federal law, of state law claims against the manufacturer of a medical pain pump.

Holding: Not yet decided

Haskell v. Harris, 10-15152

Three-Judge Panel Opinion: 669 F.3d 1049 (9th Cir. 2012)

Order Taking Case En Banc: 2012 WL 3038593 (9th Cir. July 25, 2012)

Date of Order Taking Case En Banc: July 25, 2012

Status: To be calendared the week of September 17, 2012, in San Francisco, California.

Members of En Banc Court: Not yet available.

Subject Matter: Appeal from the district court's denial of a preliminary injunction in a class action seeking to stop enforcement of the 2004 Amendment to California's DNA and Forensic Identification Data Base and Data Bank Act of 1998 (DNA Act).

Holding: Not yet decided

United States v. King, 11-10182

Three-Judge Panel Opinion: 672 F.3d 1133 (9th Cir. 2012)

Order Taking Case En Banc: 682 F.3d 779 (9th Cir. 2012)

Date of Order Taking Case En Banc: May 24, 2012

En Banc Opinion: 2012 WL 3104611 (9th Cir. August 1, 2012)

Date of En Banc Opinion: August 1, 2012

Status: Vacated the panel opinion in this case, reported at 672 F.3d 1133 (9th Cir. 2012), and referred the case back to the original panel.

Members of En Banc Court: Kozinski, Pregerson, O'Scannlain, Thomas, W. Fletcher, Paez, Berzon, Clifton, Callahan, Ikuta, N. Smith

Subject Matter: Appeal from the district court's denial of defendant's motion to suppress evidence and his conviction for being a felon in possession of a firearm.

Holding: The en banc court overruled *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005),

the precedent on which it relied, and later cases that rely on it, to the extent they hold that "there is no constitutional difference between probation and parole for purposes of the fourth amendment." The en banc court held that the cases conflict with the Supreme Court's holding in *Samson v. California*, 547 U.S. 843, 850 (2006), that "parolees have fewer expectations of privacy than probationers."

Oshodi v. Holder, 08-71478

Three-Judge Panel Opinion: 671 F.3d 1002 (9th Cir. 2012)

Order Taking Case En Banc: 678 F.3d 776 (9th Cir. 2012)

Date of Order Taking Case En Banc: May 3, 2012

Status: To be calendared the week of December 10, 2012, in San Francisco, California

Members of En Banc Court: Not yet available

Subject Matter: Petition for review from the Board of Immigration Appeals' order affirming an Immigration Judge's denial of asylum, withholding of removal and relief under the Convention Against Torture.

Holding: Not yet decided

Cuellar De Osorio v. Mayorkas, 09-56786+

Three-Judge Panel Opinion: 656 F.3d 954 (9th Cir. 2011)

Order Taking Case En Banc: 677 F.3d 921 (9th Cir. 2012)

Date of Order Taking Case En Banc: April 20, 2012

Status: Argued and submitted June 19, 2012.

Members of En Banc Court: Kozinski, Pregerson, McKeown, Wardlaw, W. Fletcher, Fisher, Gould, Paez, Rawlinson, M. Smith, Murguia

Subject Matter: Appeal of the district court's summary judgment upholding the Board of Immigration Appeals' determination that appellants' children are not entitled to relief under the Child Status Protection Act.

Holding: Not yet decided

Carrera v. Ayers, 08-99007

Three-Judge Panel Opinion: 670 F.3d 938 (9th Cir. 2011)

Order Taking Case En Banc: 676 F.3d 1158 (9th Cir. 2012)

Date of Order Taking Case En Banc: April 12, 2012

Status: Argued and submitted June 20, 2012

Members of En Banc Court: Kozinski, Pregerson, W. Fletcher, Fisher, Berzon, Tallman, Clifton, Ikuta, N. Smith, Murguia, Christen

Subject Matter: Appeal of the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition challenging a conviction for robbery and first degree murder.

Holding: Not yet decided

United States v. Cotterman, 09-10139

Three-Judge Panel Opinion: 637 F.3d 1068 (9th Cir. 2011)

Order Taking Case En Banc: 673 F.3d 1206 (9th Cir. 2012)

Date of Order Taking Case En Banc: March 19, 2012

Status: Argued and submitted June 19, 2012.

Members of En Banc Court: Kozinski, B. Fletcher, Thomas, McKeown, Fisher, Gould, Clifton, Callahan, M. Smith, Murguia, Christen

Subject Matter: Interlocutory appeal by the United States from the district court's order suppressing evidence found on a laptop computer, in a prosecution for production of child pornography and other charges.

Holding: Not yet decided

Garfias-Rodriguez v. Holder, 09-72603

Three-Judge Panel Opinion: 649 F.3d 942 (9th Cir. 2011)

Order Taking Case En Banc: 672 F.3d 1125 (9th Cir. 2012)

Date of Order Taking Case En Banc: March 1, 2012

Status: Argued and submitted June 20, 2012

Members of En Banc Court: Kozinski, Reinhardt, Graber, Fisher, Gould, Paez, Rawlinson, Clifton, Bybee, Ikuta, Murguia

Subject Matter: Petition for review from the Board of Immigration Appeals' order finding that aliens inadmissible due to reentry after accruing more than one year of unlawful presence could not apply for adjustment of status.

Holding: Not yet decided

United States v. Yopez, 09-50271

United States v. Acosta-Montes, 09-50409

Three-Judge Panel Opinion: 652 F.3d 1182 (9th Cir. 2011)

Order Taking Case En Banc: 672 F.3d 1125 (9th Cir. 2012)

Date of Order Taking Case En Banc: March 1, 2012

Status: Argued and submitted June 21, 2012

Members of En Banc Court: Kozinski, Pregerson, Reinhardt, Thomas, Graber, Wardlaw, W. Fletcher, Gould, Rawlinson, Callahan, M. Smith

Subject Matter: Sentencing appeals involving issues of criminal-history calculations.

Holding: Not yet decided

Henriquez-Rivas v. Holder, 09-71571

Three-Judge Panel Opinion: Unpublished memorandum disposition: 2011 WL 3915529 (9th Cir. September 7, 2011)

Order Taking Case En Banc: 670 F.3d 1033 (9th Cir. 2012)

Date of Order Taking Case En Banc: January 31, 2012

Status: Argued and submitted March 20, 2012

Members of En Banc Court: Kozinski, Reinhardt, Graber, McKeown, Wardlaw, Fisher, Paez, Berzon, Bybee, Bea, N. Smith

Subject Matter: Petition for review from the Board of Immigration Appeals' order sustaining the government's appeal of an Immigration Judge's grant of asylum, and denying withholding of removal and protection under the Convention Against Torture.

Holding: Not yet decided

Sessoms v. Runnels, 08-17790

Three-Judge Panel Opinion: 650 F.3d 1276 (9th Cir. 2011)

Order Taking Case En Banc: 665 F.3d 1104 (9th Cir. 2011)

Date of Order Taking Case En Banc: December 15, 2011

En Banc Opinion: 2012 WL (9th Cir. August 16, 2012)

Date of En Banc Opinion: August 16, 2012

Status: Reversed the district court's denial of petitioner's habeas corpus petition.

Members of En Banc Court: Kozinski, Schroeder, B. Fletcher, Silverman, Wardlaw, Fisher, Paez, Callahan, M. Smith, Ikuta, Murguia

Subject Matter: Appeal of district court's denial of habeas corpus petition challenging a felony murder conviction.

Holding: The California Court of Appeal unreasonably applied clearly established Supreme Court precedent in concluding that petitioner was required under *Davis v. United States*, 512 U.S. 452, 459 (1994), to unambiguously invoke his right to counsel.

Nordyke v. King, 07-15763

Three-Judge Panel Opinion: 644 F.3d 776 (9th Cir. 2011)

Order Taking Case En Banc: 664 F.3d 774 (9th Cir. 2011)

Date of Order Taking Case En Banc: November 28, 2011

En Banc Opinion: 681 F.3d 1041 (9th Cir. 2012)

Date of En Banc Opinion: June 1, 2012

Status: Affirmed the district court's dismissal of plaintiffs' Second Amendment claim. Mandate issued July 19, 2012.

Members of En Banc Court: Kozinski, Pregerson, Reinhardt, O'Scannlain, Hawkins, Graber, Gould, Tallman, Callahan, M. Smith, Ikuta

Subject Matter: Following remand by this court, appeal by gun show sponsors of the district court's summary judgment in 42 U.S.C. § 1983 action challenging Alameda County ordinance banning possession of firearms on County property.

Holding: The County's interpretation of the ordinance to permit plaintiffs to offer firearms for sale at gun shows on County property with the requirement that, when one is not in the possession of the authorized participant it must be secured to prevent unauthorized use, is reasonable. Plaintiffs' equal protection rights were not violated, because the County could reasonably conclude that gun shows were more dangerous than military reenactments.

Lacey v. Maricopa County, 09-15703 / 09-15806

Three-Judge Panel Opinion: 649 F.3d 1118 (9th Cir. 2011)

Order Taking Case En Banc: 663 F.3d 1032 (9th Cir. 2011)

Date of Order Taking Case En Banc: November 10, 2011

Status: Argued and submitted December 14, 2011

Members of En Banc Court: Kozinski, Schroeder, Pregerson, Reinhardt, W. Fletcher, Fisher, Tallman, Rawlinson, Bybee, Bea, Ikuta

Subject Matter: Cross-appeals in 42 U.S.C. § 1983 action brought by the Phoenix New Times newspaper, its writers, and its editor, alleging that defendants Sheriff Joseph Arpaio and the County Prosecutor and Special Prosecutor retaliated against them for publishing stories critical of defendants.

Holding: Not yet decided

Movsesian, et al v. Versicherung AG, 07-56722

Three-Judge Panel Opinion: 629 F.3d 901 (9th Cir. 2010)

Order Taking Case En Banc: 2011 WL 5336269 (9th Cir. November 7, 2011)

Date of Order Taking Case En Banc: November 7, 2011

En Banc Opinion: 670 F.3d 1067 (9th Cir. 2012)

Date of En Banc Opinion: February 23, 2012

Status: Reversed district court's order in class action.

Members of En Banc Court: Kozinski, Schroeder, Reinhardt, Thomas, Silverman, Graber, McKeown, Fisher, Paez, Rawlinson, Ilkuta

Subject Matter: Appeal of district court's order granting in part and denying in part insurer's motion to dismiss complaint by plaintiff class alleging breach of contract and other claims arising from insurance policies issued to Armenian Genocide victims.

Holding: California Code of Civil Procedure § 354.4, vesting California courts with jurisdiction over certain insurance claims brought by Armenian Genocide victims and extending the statute of limitations, is preempted under the foreign affairs doctrine.

Beeman v. Anthem Prescription, 07-56692+

Three-Judge Panel Opinion: 652 F.3d 1085 (9th Cir. 2011)

Order Taking Case En Banc: 661 F.3d 1199 (9th Cir. 2011)

Date of Order Taking Case En Banc: October 31, 2011

En Banc Order: 682 F.3d 779 (9th Cir. 2012); 2012 WL 2775005 (9th Cir. June 6, 2012)

Date of En Banc Order: June 6, 2012

Status: The en banc court certified the following question to the California Supreme Court: Does California Civil Code § 2527 compel speech in violation of article I, section 2 of the California Constitution?

Members of En Banc Court: Kozinski, Pregerson, O'Scannlain, Thomas, Wardlaw, W. Fletcher, Gould, Berzon, Rawlinson, Clifton, N. Smith

Subject Matter: Appeal by defendants, pharmacy benefit managers, in action brought by plaintiffs, independent retail pharmacies, to enforce California Civil Code §§ 2527 and 2528.

Holding: Not yet decided.

United States v. Nosal, 10-10038

Three-Judge Panel Opinion: 642 F.3d 781 (9th Cir. 2011)

Order Taking Case En Banc: 661 F.3d 1180 (9th Cir. 2011)

Date of Order Taking Case En Banc: October 27, 2011

En Banc Opinion: 676 F.3d 854 (9th Cir. 2012)

Date of En Banc Opinion: April 10, 2012

Status: Affirmed the district court's dismissal of counts charging defendant with violations of the Computer Fraud and Abuse Act ("CFAA"). Mandate issued August 3, 2012.

Members of En Banc Court: Kozinski, Pregerson, Silverman, McKeown, Wardlaw, Gould, Paez, Tallman, Clifton, Bybee, Murguia

Subject Matter: Appeal by the United States of the district court's order dismissing counts of an indictment charging an employee with exceeding authorized access to a protected computer, in violation of the CFAA.

Holding: Definition in CFAA of the language "exceeds authorized access" is limited to violations of restrictions on access to information, not restrictions on its use. Because

defendant's accomplices had permission to access the company database and obtain information in it, the charges failed to meet the element of "without authorization, or exceeds access" under 8 U.S.C. § 1030(a)(4).

Karuk Tribe of California v. United States Forest Service, 05-16801

Three-Judge Panel Opinion: 640 F.3d 979 (9th Cir. 2011)

Order Taking Case En Banc: 658 F.3d 953 (9th Cir. 2011)

Date of Order Taking Case En Banc: September 12, 2011

En Banc Opinion: 681 F.3d 1006 (9th Cir. 2012)

Date of En Banc Opinion: June 1, 2012

Status: Reversed the district court's denial of summary judgment on the Karuk Tribe's Endangered Species Act (ESA) claim, and remanded for entry of judgment in favor of the Tribe. Mandate issued July 25, 2012.

Members of En Banc Court: Kozinski, Silverman, Graber, Wardlaw, W. Fletcher, Gould, Paez, Berzon, M. Smith, Ikuta, Murguia

Subject Matter: Appeal by the Karuk Tribe of California of the district court's judgment in favor of the United States Forest Service (USFS) in the Tribe's action challenging mining operations in the Klamath National Forest.

Holding: The USFS violated the ESA by not consulting with the appropriate wildlife agencies before approving Notices of Intent to conduct mining activities in coho salmon critical habitat within the Forest.

United States v. Milovanovic, 08-30381

Three-Judge Panel Opinion: 627 F.3d 405 (9th Cir. 2010)

Order Taking Case En Banc: 655 F.3d 1106 (9th Cir. 2011)

Date of Order Taking Case En Banc: August 24, 2011

En Banc Opinion: 678 F.3d 713 (9th Cir. 2012)

Date of En Banc Opinion: April 24, 2012; amended May 22, 2012

Status: Reversed and remanded the district court's dismissal of a superseding indictment charging six defendants with honest services fraud.

Members of En Banc Court: Kozinski, Graber, Wardlaw, Gould, Paez, Tallman, Rawlinson, Clifton, Bea, M. Smith, Murguia

Subject Matter: Appeal by the United States of the district court's dismissal of an indictment before trial for honest services mail fraud.

Holding: A fiduciary relationship is an element of honest services fraud under 18 U.S.C. §§ 1341 and 1346, but the relationship need not be a formal, or classic, fiduciary relationship. Foreseeable risk of economic harm is not a necessary element when evaluating breach of a fiduciary duty in violation of §§ 1341 and 1346, adopting instead a materiality test.

Young v. Holder, 07-70949

Three-Judge Panel Opinion: 634 F.3d 1014 (9th Cir. 2011)

Order Taking Case En Banc: 653 F.3d 897 (9th Cir. 2011)

Date of Order Taking Case En Banc: July 29, 2011

Status: Argued and submitted December 12, 2011. Supplemental briefing ordered 12/16/11.

Members of En Banc Court: Kozinski, Schroeder, B. Fletcher, Pregerson, Kleinfeld, Graber, Fisher, Paez, Clifton, Bea, Ikuta

Subject Matter: Petition for review from the Board of Immigration Appeals' decision finding petitioner removable based on his conviction for violating California Health & Safety Code § 11352(a).

Holding: Not yet decided

Native Village of Eyak v. Locke, 09-35881

Prior En Banc Court Order: *Eyak Native Village v. Daley*, 02-36155, 375 F.3d 1218 (9th Cir. 2004) (en banc)

Date of Order Taking Case En Banc: June 21, 2011

En Banc Opinion: 2012 WL 3089354 (9th Cir. July 31, 2012)

Date of En Banc Opinion: July 31, 2012

Status: Affirmed the district court's post-trial dismissal of the Alaskan Native Villages' complaint.

Members of En Banc Court: Kozinski, Schroeder, Pregerson, Kleinfeld, Hawkins, Thomas, W. Fletcher, Paez, Tallman, Rawlinson, Clifton

Subject Matter: Appeal by Native Villages on remand from this court in prior en banc appeal, from district court's judgment in favor of the Secretary of Commerce in plaintiffs' action challenging fishing regulations and alleging nonexclusive aboriginal hunting and fishing rights in the Outer Continental Shelf off the southern coast of Alaska.

Holding: The Alaskan Native Villages failed to establish an entitlement to non-exclusive aboriginal hunting and fishing rights in the areas of the Outer Continental Shelf in the Gulf of Alaska. The court did not need to consider whether there was a conflict with the federal paramountcy doctrine, or whether the Secretary of Commerce's actions violated the Indian Non-Intercourse Act.

Price v. Stevedoring Services of America, 08-71719

Three-Judge Panel Opinion: 627 F.3d 1145 (9th Cir. 2010)

Order Taking Case En Banc: 653 F.3d 928 (9th Cir. 2011)

Date of Order Taking Case En Banc: August 1, 2011

Status: Argued and submitted September 22, 2011, submission vacated September 29, 2011, pending the Supreme Court's decision in *Roberts v. Sea-Land Services, Inc.*, No. 10-1399, cert. granted.

Members of En Banc Court: Kozinski, Schroeder, Reinhardt, O'Scannlain, Thomas, Silverman, W. Fletcher, Gould, Berzon, Bea, Murguia

Subject Matter: Petition for review from a decision of the Benefits Review Board determining petitioner's average weekly wage and maximum compensation rate.

Holding: Not yet decided

Garcia v. Benov, 09-56999

Three-Judge Panel Opinion: Unpublished memorandum disposition: 395 Fed.Appx. 329 (9th Cir. 2010)

Order Taking Case En Banc: 636 F.3d 1174 (9th Cir. 2011)

Date of Order Taking Case En Banc: February 28, 2011

En Banc Opinion: 683 F.3d 952 (9th Cir. 2012)

Date of En Banc Opinion: June 8, 2012

Status: Vacated the district court's order granting a 28 U.S.C. § 2241 habeas petition challenging extradition to the Philippines, and remanded.

Members of En Banc Court: Kozinski, Pregerson, Thomas, Graber, Wardlaw, W. Fletcher, Berzon, Tallman, Clifton, M. Smith, Ikuta

Subject Matter: Appeal by an alien from the district court's denial of his petition for writ of habeas corpus challenging the Secretary of State's extradition decision.

Holding: The district court had jurisdiction under 28 U.S.C. § 2241 and the federal Constitution, and neither the REAL ID Act nor the Foreign Affairs Reform and Restructuring Act of 1998, which implemented the Convention Against Torture, repealed federal habeas jurisdiction. CAT and FARRA and their regulations generate a liberty interest under the Due Process Clause, which require the Secretary of State before extradition to determine whether it is "more likely than not" that an extraditee asserting a CAT claim will face torture. The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration.

Comite de Jornaleros v. City of Redondo, 06-55750

Three-Judge Panel Opinion: 607 F.3d 1178 (9th Cir. 2010)

Order Taking Case En Banc: 623 F.3d 1054 (9th Cir. 2010)

Date of Order Taking Case En Banc: October 15, 2010

En Banc Opinion: 657 F.3d 936 (9th Cir. 2011)

Date of En Banc Opinion: September 16, 2011

Status: Affirmed the district court's summary judgment

Members of En Banc Court: Kozinski, Thomas, Graber, Gould, Berzon, Bybee, Callahan, Bea, M. Smith, Ikuta, N.R. Smith

Subject Matter: Appeal of district court's summary judgment in day laborers' First Amendment challenge to ordinance prohibiting solicitation of business on streets and highways.

Holding: The ordinance is a facially unconstitutional restriction on speech which failed to satisfy the narrow tailoring element of the Supreme Court's "time, place, and manner" test. Solicitation of business or employment constitutes protected expression under the First Amendment.

Sarei v. Rio Tinto, PLC, 02-56256 / 02-56390

Three-Judge Panel Opinion: 487 F.3d 1193 (9th Cir. 2007)

Order Taking Case En Banc: 499 F.3d 923 (9th Cir. 2007)

Date of Order Taking Case En Banc: August 20, 2007

En Banc Opinion: 550 F.3d 822 (9th Cir. 2008); 2011 WL 5041927 (9th Cir. October 25, 2011).

Date of En Banc Opinion: December 16, 2008; October 25, 2011

Status: Affirmed in part and reversed in part the district court's judgment in an Alien Tort Statute case arising out of the operations of Rio Tinto mining group on the island of Bougainville in Papua New Guinea and the uprising against Rio Tinto in the late 1980's. The en banc court affirmed the district court's order on prudential exhaustion and its dismissal of claims of racial discrimination and crimes against humanity, and reversed the dismissal of claims for genocide and war crimes and remanded for further

proceedings on these claims.

Members of En Banc Court: Schroeder, Pregerson, Reinhardt, Kleinfeld, Silverman, McKeown, Berzon, Rawlinson, Callahan, Bea, Ikuta

Subject Matter: Appeal of the district court's dismissal of a class action complaint brought by current and former residents of the island of Bougainville in Papua New Guinea against a mining company under the Alien Tort Claims Act.

Holding: Plaintiffs' claims of genocide and war crimes fell within the limited federal jurisdiction created by the ATS, and their claims of crimes against humanity arising from a blockade and racial discrimination did not. The complaint adequately alleged genocide and war crimes claims.